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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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RHONDA R. HESS,

Plaintiff,

v.

NANCY A. BERRYHILL¹, Commissioner of
Social Security,

Defendant.

Case No. 2:18-cv-02431-DJA

ORDER

13 This matter involves the review of an administrative action by the Commissioner of Social
14 Security (“Commissioner”) denying Plaintiff Rhonda R. Hess’ (“Plaintiff”) application for
15 disability insurance benefits under Title II of the Social Security Act. The Court has reviewed
16 Plaintiff’s Motion for Reversal or to Remand (ECF No. 11), filed on April 12, 2019, and the
17 Commissioner’s Response and Cross-Motion to Affirm (ECF Nos. 16-17), filed on July 16, 2019.
18 Plaintiff filed a Reply (ECF No. 18) on August 6, 2019.

19 **I. BACKGROUND**

20 **1. Procedural History**

21 On March 9, 2015, Plaintiff protectively applied for disability insurance benefits, alleging
22 an onset date of November 5, 2014. AR² 173. Plaintiff’s claim was denied initially, and on
23 reconsideration. AR 92-5 and 105-110. A hearing was held before an Administrative Law Judge
24 (“ALJ”) on August 31, 2017. AR 32-65. On February 21, 2018, the ALJ issued a decision
25 denying Plaintiff’s claim. AR 14-31. The ALJ’s decision became the Commissioner’s final
26

27 ¹ Andrew Saul is now the Commissioner of Social Security and substituted as a party.

28 ² AR refers to the Administrative Record in this matter. (Notice of Manual Filing (ECF No. 7).)

1 decision when the Appeals Council denied review, on October 31, 2018. AR 1-6. On December
2 27, 2018 Plaintiff commenced this action for judicial review under 42 U.S.C. §§ 405(g). (*See*
3 Compl. (ECF No. 1).)

4 **2. The ALJ Decision**

5 The ALJ followed the five-step sequential evaluation process set forth in 20 C.F.R. §§
6 404.1520. AR 19-27. At step one, the ALJ found that Plaintiff had not engaged in substantial
7 gainful activity from the alleged onset date of November 5, 2014 through the date of the decision.
8 AR 19. At step two, the ALJ found that Plaintiff had medically determinable “severe”
9 impairments of irritable bowel syndrome, celiac disease, hypertension, and gastroesophageal
10 reflux disease (GERD) and non-severe impairments of right shoulder pain, tachycardia,
11 hypothyroidism, small hiatal hernia, anxiety, and depression. *Id.* at 19-20. He rated the
12 paragraph B criteria as no limitation, no limitation, mild limitation, and no limitation. *Id.* at 20.
13 At step three, the ALJ found that Plaintiff did not have an impairment or combination of
14 impairments that met or medically equaled a listed impairment in 20 C.F.R. Part 404, Subpart P,
15 Appendix 1. *Id.* at 22. At step four, the ALJ found that Plaintiff has the residual functional
16 capacity to perform a full range of work at all exertional levels with the following nonexertional
17 limitations: occasionally stoop, bend, kneel, crouch, crawl, or climb ramps or stairs but never
18 climb ropes, ladders, or scaffolds; due to irregular bowel movements, need two restroom breaks
19 in addition to the customary morning, afternoon, and lunch breaks during an eight-hour work day.
20 *Id.* The ALJ found that Plaintiff is capable of performing her past relevant work as a valet
21 attendant and parking lot attendant supervisor as the positions are actually and normally
22 performed. *Id.* at 26. This work does not require the performance of work-related activities
23 precluded by the claimant’s RFC. *Id.* Accordingly, the ALJ concluded that Plaintiff was not
24 under a disability at any time from November 5, 2014, through the date of the decision. *Id.* at 27.

25 **II. DISCUSSION**

26 **1. Standard of Review**

27 Administrative decisions in social security disability benefits cases are reviewed under 42
28 U.S.C. § 405(g). *See Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002). Section 405(g)

1 states: “Any individual, after any final decision of the Commissioner of Social Security made
2 after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a
3 review of such decision by a civil action . . . brought in the district court of the United States for
4 the judicial district in which the plaintiff resides.” The court may enter “upon the pleadings and
5 transcripts of the record, a judgment affirming, modifying, or reversing the decision of the
6 Commissioner of Social Security, with or without remanding the cause for a rehearing.” *Id.* The
7 Ninth Circuit reviews a decision affirming, modifying, or reversing a decision of the
8 Commissioner de novo. *See Batson v. Comm’r*, 359 F.3d 1190, 1193 (9th Cir. 2004).

9 The Commissioner’s findings of fact are conclusive if supported by substantial evidence.
10 *See* 42 U.S.C. § 405(g); *Ukolov v. Barnhart*, 420 F.3d 1002 (9th Cir. 2005). However, the
11 Commissioner’s findings may be set aside if they are based on legal error or not supported by
12 substantial evidence. *See Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir.
13 2006); *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). The Ninth Circuit defines
14 substantial evidence as “more than a mere scintilla but less than a preponderance; it is such
15 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”
16 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995); *see also Bayliss v. Barnhart*, 427 F.3d
17 1211, 1214 n.1 (9th Cir. 2005). In determining whether the Commissioner’s findings are
18 supported by substantial evidence, the court “must review the administrative record as a whole,
19 weighing both the evidence that supports and the evidence that detracts from the Commissioner’s
20 conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *see also Smolen v. Chater*, 80
21 F.3d 1273, 1279 (9th Cir. 1996).

22 Under the substantial evidence test, findings must be upheld if supported by inferences
23 reasonably drawn from the record. *Batson*, 359 F.3d at 1193. When the evidence will support
24 more than one rational interpretation, the court must defer to the Commissioner’s interpretation.
25 *See Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005); *Flaten v. Sec’y of Health and Human*
26 *Serv.*, 44 F.3d 1453, 1457 (9th Cir. 1995). Consequently, the issue before the court is not whether
27 the Commissioner could reasonably have reached a different conclusion, but whether the final
28 decision is supported by substantial evidence. It is incumbent on the ALJ to make specific

1 findings so that the court does not speculate as to the basis of the findings when determining if the
2 Commissioner's decision is supported by substantial evidence. Mere cursory findings of fact
3 without explicit statements as to what portions of the evidence were accepted or rejected are not
4 sufficient. *Lewin v. Schweiker*, 654 F.2d 631, 634 (9th Cir. 1981). The ALJ's findings "should
5 be as comprehensive and analytical as feasible, and where appropriate, should include a statement
6 of subordinate factual foundations on which the ultimate factual conclusions are based." *Id.*

7 **2. Disability Evaluation Process**

8 The individual seeking disability benefits has the initial burden of proving disability.
9 *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir 1995). To meet this burden, the individual must
10 demonstrate the "inability to engage in any substantial gainful activity by reason of any medically
11 determinable physical or mental impairment which can be expected . . . to last for a continuous
12 period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). More specifically, the individual
13 must provide "specific medical evidence" in support of her claim for disability. 20 C.F.R. §
14 404.1514. If the individual establishes an inability to perform her prior work, then the burden
15 shifts to the Commissioner to show that the individual can perform other substantial gainful work
16 that exists in the national economy. *Reddick*, 157 F.3d at 721.

17 The ALJ follows a five-step sequential evaluation process in determining whether an
18 individual is disabled. *See* 20 C.F.R. § 404.1520; *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987). If
19 at any step the ALJ determines that he can make a finding of disability or nondisability, a
20 determination will be made and no further evaluation is required. *See* 20 C.F.R. §
21 404.1520(a)(4); *Barnhart v. Thomas*, 540 U.S. 20, 24 (2003). Step one requires the ALJ to
22 determine whether the individual is engaged in substantial gainful activity ("SGA"). 20 C.F.R. §
23 404.1520(b). SGA is defined as work activity that is both substantial and gainful; it involves
24 doing significant physical or mental activities usually for pay or profit. *Id.* § 404.1572(a)-(b). If
25 the individual is engaged in SGA, then a finding of not disabled is made. If the individual is not
26 engaged in SGA, then the analysis proceeds to the step two. Step two addresses whether the
27 individual has a medically determinable impairment that is severe or a combination of
28 impairments that significantly limits her from performing basic work activities. *Id.* §

1 404.1520(c). An impairment or combination of impairments is not severe when medical and
2 other evidence establishes only a slight abnormality or a combination of slight abnormalities that
3 would have no more than a minimal effect on the individual's ability to work. *Id.* § 404.1521; *see*
4 *also* Social Security Rulings ("SSRs") 85-28, 96-3p, and 96-4p.³ If the individual does not have a
5 severe medically determinable impairment or combination of impairments, then a finding of not
6 disabled is made. If the individual has a severe medically determinable impairment or
7 combination of impairments, then the analysis proceeds to step three.

8 Step three requires the ALJ to determine whether the individual's impairments or
9 combination of impairments meet or medically equal the criteria of an impairment listed in 20
10 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §§ 404.1520(d), 404.1525, and 404.1526. If
11 the individual's impairment or combination of impairments meet or equal the criteria of a listing
12 and the duration requirement (20 C.F.R. § 404.1509), then a finding of disabled is made. 20
13 C.F.R. § 404.1520(h). If the individual's impairment or combination of impairments does not
14 meet or equal the criteria of a listing or meet the duration requirement, then the analysis proceeds
15 to step four.

16 Before moving to step four, however, the ALJ must first determine the individual's
17 residual functional capacity ("RFC"), which is a function-by-function assessment of the
18 individual's ability to do physical and mental work-related activities on a sustained basis despite
19 limitations from impairments. *See* 20 C.F.R. § 404.1520(e); *see also* SSR 96-8p. In making this
20 finding, the ALJ must consider all the relevant evidence, such as all symptoms and the extent to
21 which the symptoms can reasonably be accepted as consistent with the objective medical
22 evidence and other evidence. 20 C.F.R. § 404.1529; *see also* SSRs 96-4p and 16-3p. To the
23 extent that statements about the intensity, persistence, or functionally limiting effects of pain or
24 other symptoms are not substantiated by objective medical evidence, the ALJ must evaluate the

26 ³ SSRs constitute the SSA's official interpretation of the statute and regulations. *See Bray v.*
27 *Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1224 (9th Cir. 2009); *see also* 20 C.F.R. § 402.35(b)(1).
28 They are entitled to some deference as long as they are consistent with the Social Security Act and
regulations. *Bray*, 554 F.3d at 1223 (finding ALJ erred in disregarding SSR 82-41).

1 individual's statements based on a consideration of the entire case record. The ALJ must also
2 consider opinion evidence in accordance with the requirements of 20 C.F.R. § 404.1527 and
3 SSRs 96-2p, 96-5p, 96-6p, and 06-3p.

4 Step four requires the ALJ to determine whether the individual has the RFC to perform
5 her past relevant work ("PRW"). 20 C.F.R. § 404.1520(f). PRW means work performed either
6 as the individual actually performed it or as it is generally performed in the national economy
7 within the last 15 years or 15 years before the date that disability must be established. In
8 addition, the work must have lasted long enough for the individual to learn the job and performed
9 at SGA. 20 C.F.R. §§ 404.1560(b) and 404.1565. If the individual has the RFC to perform her
10 past work, then a finding of not disabled is made. If the individual is unable to perform any PRW
11 or does not have any PRW, then the analysis proceeds to step five.

12 The fifth and final step requires the ALJ to determine whether the individual is able to do
13 any other work considering her RFC, age, education, and work experience. 20 C.F.R. §
14 404.1520(g). If she is able to do other work, then a finding of not disabled is made. Although the
15 individual generally continues to have the burden of proving disability at this step, a limited
16 burden of going forward with the evidence shifts to the Commissioner. The Commissioner is
17 responsible for providing evidence that demonstrates that other work exists in significant numbers
18 in the national economy that the individual can do. *Yuckert*, 482 U.S. at 141-42.

19 **3. Analysis**

20 **a. Whether the ALJ Properly Considered Plaintiff's Subjective** 21 **Testimony**

22 Plaintiff contends that the ALJ found no evidence of malingering so he was required to
23 cite clear and convincing reasons for rejecting Plaintiff's pain and limitation testimony, which he
24 failed to do. (ECF No. 11, 11). She claims that the ALJ's summary of the medical evidence is
25 not sufficient grounds to reject her testimony. (*Id.* at 12-14). Plaintiff also argues that the ALJ
26 erred in rejecting Plaintiff's testimony based on the conflicting opinion evidence and inconsistent
27 activities of daily living. (*Id.* at 15-16). She further contends that the ALJ was unclear as to why
28 he rejected Plaintiff's testimony regarding restroom breaks and the RFC does not reflect her pain

1 and limitations. (*Id.* at 16-17). The Commissioner responds that the ALJ properly found
2 Plaintiff's testimony not fully supported by the record because he cited to inconsistencies in
3 Plaintiff's activities of daily living, the objective medical evidence, and the fact that the medical
4 evidence was largely in accord with the assigned RFC. (ECF No. 16, 2-5). Plaintiff replies with
5 the contention that she is entitled to judgment as a matter of law, but adds no further substantive
6 argument. (ECF No. 18).

7 While an ALJ must consider a plaintiff's representations about her symptoms and
8 limitations, her statements about her "pain or other symptoms will not alone establish that" she is
9 disabled. 20 C.F.R. § 404.1529(a). In fact, an "ALJ cannot be required to believe every
10 allegation of [disability], or else disability benefits would be available for the asking, a result
11 plainly contrary to [the Act]." *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). However,
12 absent affirmative evidence that the claimant is malingering, the ALJ's reasons for rejecting the
13 claimant's testimony must be clear and convincing. *Burrell v. Colvin*, 775 F.3d 1133, 1136-37
14 (9th Cir. 2014). Specifically, the ALJ must state why the testimony is unpersuasive and point to
15 what testimony or evidence undermines the claimant's testimony. *See, e.g., Parra v. Astrue*, 481
16 F.3d 742, 750 (9th Cir. 2007) (upholding ALJ's credibility determination when he pointed out
17 numerous lab results that contradicted his subjective complaints); *see also Robbins v. Social Sec.*
18 *Admin.*, 466 F.3d 880, 884-85 (9th Cir. 2006) (ALJ required to provide a "narrative discussion"
19 and state specific evidence in the record supporting an adverse credibility finding).

20 The ALJ "may not reject a claimant's subjective complaints based solely on a lack of
21 medical evidence to fully corroborate the alleged severity of pain." *Burch*, 400 F.3d at 680. This
22 is because the lack of an objective medical basis is just one factor in evaluating the credibility of a
23 claimant's testimony and complaints. *See Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991)
24 (en banc). Moreover, the Court notes that SSR 16-3 clarified that ALJ no longer has to make
25 credibility findings, but rather, evaluate the extent to which the alleged functional limitations and
26 restrictions due to pain and other symptoms are consistent with the other evidence. If "evidence
27 can support either affirming or reversing the ALJ's decision," the Court may not substitute its
28 judgment for that of the ALJ's. *Robbins*, 466 F.3d at 882.

1 Here, the ALJ considered the contrary objective medical evidence to Plaintiff's subjective
2 claims. He noted her treatment notes indicated she stopped taking her diet pills, had a special
3 diet, and reported less abdominal pain and bloating as of March 2016. AR 24. Further, the ALJ
4 underscored that her examination in January of 2017 and more recent treatment notes in May
5 2017 were normal. AR 25. Thus, the medical treatment in the record conflict with Plaintiff's
6 claim of disabling level pain and symptoms. *See Celaya v. Halter*, 332 F.3d 1177, 1181 (9th Cir.
7 2003) (pain complaints properly rejected where the ALJ "reasonably noted" evidence that pain
8 had come under control). Also, the consultative examination showed tenderness in her abdomen,
9 but Plaintiff was able to sit and rise without difficulty and walk with normal gait, which led the
10 consultative examiner to assess her with no exertional limitations. *Id.* As such, the medical
11 opinion evidence supports the ALJ's finding that Plaintiff's testimony is inconsistent with the
12 overall record. *See Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175 (9th Cir. 2008) (medical
13 source reports support the ALJ's determination).

14 Moreover, the ALJ highlighted Plaintiff's inconsistent statements that undermined the
15 credibility of her claims. *See Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) ("ALJ may
16 consider inconsistencies either in the claimant's testimony or between the testimony and the
17 claimant's conduct."); *see also Valentine v. Astrue*, 574 F.3d 685, 694 (9th Cir. 2009) (ALJ
18 properly found claimant "demonstrated better abilities than he acknowledged in his written
19 statements and testimony"). For example, he highlighted that her allegation that she engages in
20 few social activities is inconsistent with the record that she engaged in a wider range of activities
21 and more social interaction. AR 20-21. After a careful review of the ALJ's evaluation of
22 Plaintiff's alleged limitations and pain and other symptoms, the Court finds that he complied with
23 SR 16-3 and the Ninth Circuit standard such that it may not substitute its judgment for that of the
24 ALJ's. *See Burch*, 400 F.3d at 679. Therefore, the Court concludes that the ALJ's decision is
25 supported by substantial evidence and free from reversible legal error.

26 **III. CONCLUSION AND ORDER**

27 Accordingly, IT IS HEREBY ORDERED that Plaintiff's Motion to Remand (ECF No.
28 11) is **denied**.

1 IT IS FURTHER ORDERED that the Commissioner's Cross-Motion to Affirm (ECF No.
2 16) is **granted**.

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4 DATED: February 6, 2020



DANIEL J. ALBREGTS
UNITED STATES MAGISTRATE JUDGE